ORIGINAL

Supreme Court, U.S.
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NO. 06-710

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; DAVID DIGUGLIELMO, Superintendent State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent State Correctional Institution at Rockview,

Petitioners,

v.

HUBERT L. MICHAEL,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH M. COSGROVE
1460 Wyoming Avenue
Forty Fort, PA 18704
570-287-0921

Counsel for Hubert L. Michael

Dated: January 22, 2007

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Have Petitioners shown that this case is of such imperative public importance as to require immediate review in this Court of the interlocutory order of the United States Court of Appeals for the Third Circuit, which remanded the case to the District Court in order to assess Mr. Michael's competence, where the Third Circuit found substantial reasons for requiring reassessment of his competence?

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CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III 9

For the reasons stated below, this Court should deny the petition for writ of certiorari, which requests review of an interlocutory order of the United States Court of Appeals for the Third Circuit, but fails utterly to show that the "case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court," as required by Supreme Court Rule 11.[1]

COUNTER-STATEMENT OF THE CASE

Respondent Hubert L. Michael was sentenced to death after waiving his right to trial and pleading guilty to the charge of first degree murder. Mr. Michael had previously rejected an offer from the Commonwealth of a life sentence in exchange for a plea of guilt. Six days after pleading guilty, Mr. Michael attempted to withdraw his plea. This was the first of many instances in which Mr. Michael has made a critical litigation decision and then changed his mind or tried to change his mind.

Trial counsel knew or should have known that Mr. Michael was depressed; that he had a history of mood swings and social isolation; that he had been unable to communicate with counsel about the case; and that Mr. Michael's mental health and history were therefore important areas to investigate, both with respect to potential mitigating evidence and with respect to Mr. Michael's competency. Immediately prior to the capital sentencing proceeding – with no inquiry into competency having taken place – Mr. Michael announced that he intended to present no evidence. When the trial court advised Respondent that this would likely lead to imposition of a sentence of death, Mr. Michael purportedly acknowledged that he understood, to which the

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[1]The petition for writ of certiorari is cited herein as "*Petition*." Petitioners are referred to as "the Commonwealth." All emphasis herein is supplied unless otherwise indicated. Parallel citations are omitted.

court responded: "[I]f you want the death penalty, ... we can arrange it for you."

Mr. Michael has continued to vacillate about whether and how to litigate throughout this case, from the original effort to withdraw his guilty plea to several requests – later rescinded – to proceed without counsel and have his death sentence carried out. While Mr. Michael has at times both authorized counsel to represent him and then attempted to withdraw such authorizations regarding various efforts of counsel on his behalf, Mr. Michael has ultimately authorized the actions taken on his behalf to perfect the litigation at each level of this case. This is true of the direct appeal of his sentence to the Pennsylvania Supreme Court (a review which is nonetheless mandated by statute, 42 Pa. C.S. § 9711), as well as the state post-conviction proceedings, and ultimately, the federal habeas petition and appeal of the District Court's order.[2]

After denial of his post-conviction petition by the Pennsylvania courts, Mr. Michael endorsed the habeas petition previously filed on his behalf by his prior counsel from the Defender Association of Philadelphia, Federal Habeas Corpus Unit (Defender Association). This acceptance by Mr. Michael yet again followed his vacillation between challenging his conviction and sentence, or withdrawing his appeals. Each time, when pressed on the matter, Mr. Michael embraced and continued to pursue the litigation.[3]

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[2]On appeal of the denial of post-conviction relief, Mr. Michael sent an affidavit to the Pennsylvania Supreme Court requesting that his appeal be withdrawn. After a remand for competency proceedings, Mr. Michael "filed a new affidavit in which he asked [the Pennsylvania Supreme Court] to decide the merits of his PCRA appeal quickly, essentially repudiating his request to withdraw the appeal." Commonwealth v. Michael, 755 A.2d 1274, 1276 (Pa. 2000). The Pennsylvania Supreme Court proceeded to review the merits of his claims.

[3]Determining whether Mr. Michael's serial vacillation is the result of a mental illness sufficiently severe to render him incompetent is the reason for the Third Circuit's remand for a competency evaluation. At oral argument before the Circuit, even counsel for the Commonwealth acknowledged that mental health issues were "[a]bsolutely" present in this case.

Before the District Court, however, Mr. Michael thereafter assumed another posture, requesting dismissal of the petition. Undersigned was appointed by the District Court to represent Mr. Michael's interests, while the Defender Association lawyers remained counsel of record. Those lawyers had asked the District Court, prior to undersigned's appointment, to order a mental health evaluation of Mr. Michael, which the Court granted. This evaluation was conducted by the Court's own expert, Dr. Robert Wettstein. After undersigned's appointment, a hearing was held to determine Mr. Michael's competence to waive his habeas rights.

On March 10, 2004, the District Court issued its order finding Mr. Michael competent, and dismissed the habeas petition. The District Court's finding, indeed, was based almost entirely on the testimony of Dr. Wettstein. The District Court went further, however, dismissing not only the Defender Association, but *also* dismissing undersigned as counsel for Mr. Michael as well – something Mr. Michael had not requested then and, to present, does not seek. This left Mr. Michael without counsel, in violation of 21 U.S.C. § 848 (repealed, now found at 18 U.S.C. § 3599). The Defender Association filed an appeal to the Third Circuit, to which the Commonwealth responded by seeking dismissal. The Third Circuit provisionally granted dismissal, but allowed Mr. Michael ten days to respond and indicate whether he wished to proceed with the appeal. The very next day, Mr. Michael signed a statement requested by the Court, advising that he *did* wish to pursue the appeal and further asking that the undersigned be appointed to represent him.[4]

After oral argument, the Third Circuit granted a certificate of appealability on the

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[4]Indeed, while Mr. Michael has sent a number of letters to the Third Circuit during the course of these proceedings, he has repeatedly asserted that he wants undersigned to remain as his counsel.

question of whether the District Court had erred in dismissing ***all*** counsel for Mr. Michael in its March 2004 order. Immediately prior to this, Dr. Wettstein, the District Court's expert, addressed a letter to the Court calling into question the District Court's competency finding, which was premised on Dr. Wettstein's determination of Mr. Michael's "steadfastness" in wanting to terminate all challenges to his conviction and death sentence. Given Mr. Michael's approval of the appeal to the Third Circuit, Dr. Wettstein indicated that his prior finding was now in question, and that Mr. Michael's "mental state needs further exploration."[5] After oral argument, Mr. Michael once again sent a series of letters to the Court, in which he again vacillated on the question of how (if at all) and to what extent he wished to challenge his conviction and sentence.[6]

The original decision of the Circuit granting a certificate of appealability ("COA") was issued after this series of letters in June of 2005. The Third Circuit ruled that since Respondent was then represented by counsel his letters were of no moment, and the matter was therefore remanded to the District Court for consideration of the merits of the habeas petition. After initially denying rehearing, however, the Third Circuit withdrew the mandate and held a second oral argument on the appeal. The Third Circuit then issued a nonfinal, interlocutory decision

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[5]Thereafter, Dr. Wettstein wrote two additional letters to the Court, in which he again raised concerns that the original finding of competence was in question, given Mr. Michael's repeated vacillations, and suggested the need for further evaluation of Mr. Michael's competence.

[6]For example, in January 2006, Mr. Michael wrote that he wanted undersigned counsel to remain as his lawyer "for the duration of this matter." In February 2006, he wrote that he wanted the undersigned to represent him "as long as I am before any court regarding any criminal matter." While he indicated that he did not want further appeals of his death sentence, he did not ask for all of his appeals – which also challenge his convictions – to be withdrawn. Mr. Michael has not written to any of the federal courts since the Third Circuit's remand order.

remanding this matter to the District Court for further evaluation of Mr. Michael's competence.

The Third Circuit was well aware that a competent defendant – including one under sentence of death – may dismiss his appeals. Critical to the Third Circuit's decision to remand, therefore, were the following facts: (1) Dr. Wettstein's "report and testimony were the bases for the District Court's competency finding"; and (2) Dr. Wettstein "subsequently has thrice taken the position that Michael should be reevaluated." Michael v. Horn, 459 F.3d 411, 419 (3d Cir. 2006). Given Dr. Wettstein's desire for further evaluation of Mr. Michael's competence, the Third Circuit found as a factual matter that there was "a 'substantial reason' not to presume continuing competency here." Id. (quoting Smith v. Armontrout, 865 F.2d 1502, 1505 (8th Cir. 1988) (en banc)). Accordingly, the Third Circuit found there were doubts as to Mr. Michael's competence, and remanded to the District Court "to determine if Michael is competent to make the decision to dismiss the appeal." Michael, 459 F.3d at 420.[7]

[7]Judge Greenberg, who had dissented from the panel's earlier decision to remand the case for consideration of the merits, concurred in the remand order. Id. at 421.

REASONS FOR DENYING THE WRIT

THE COMMONWEALTH HAS FAILED TO SHOW ANY SUBSTANTIAL BASIS, LET ALONE A REASON OF IMPERATIVE PUBLIC IMPORTANCE, TO REVIEW THE THIRD CIRCUIT'S INTERLOCUTORY ORDER.

The Commonwealth seeks certiorari review of an order that is not final and does not satisfy the requirements for review of interlocutory decisions. Moreover, the Commonwealth asks this Court to address questions that are not even addressed in that interlocutory order, but are at best ancillary to the merits of the substantive issues yet unresolved at the circuit level. The Commonwealth, though, has utterly failed to show any reason why this Court should intervene in the ongoing litigation at this time.

As indicated in the *Petition*, in this *Brief in Opposition*, and in the rulings by both the District Court and the Third Circuit, Mr. Michael's vacillating mental state and vacillating desires about the habeas litigation and appeals have complicated efforts to reach an appropriate resolution of this case. Faced with that situation, the Third Circuit panel – after grappling with it for some time – unanimously decided that the appropriate step to take at this time is a remand to the District Court for a reevaluation of Mr. Michael's competence. The Third Circuit emphasized that in doing so, it was not ruling on other asserted grounds to dismiss the appeal, or on the underlying issue on which it granted COA in the first place. Michael v. Horn, 459 F.3d at 420.

Rather than await the District Court's determination of Mr. Michael's competence and desires with respect to the appeal, or any final ruling by the Third Circuit on the merits of the appeal if it is not dismissed, the Commonwealth seeks immediate intervention by this Court.

Such intervention is rarely countenanced by this Court. As Supreme Court Rule 11 plainly states, review of an interlocutory order of a court of appeals "will be granted only upon a showing that the case is of *such imperative public importance* as to justify deviation from normal appellate practice and to require *immediate* determination in this Court."[8]

The Commonwealth has not even attempted to make such a showing. Indeed, the Commonwealth has failed to present any question worthy of this Court's resolution.

The questions presented in the *Petition* gloss over the fact that when the Court of Appeals asked Mr. Michael whether he wanted the appeal of the District Court's order dismissing his petition, he stated that he did want the appeal, and sought appointment of undersigned as his counsel (as noted above, with dismissal of undersigned and the lawyers from the Defender Association, the District Court's order had left Respondent "counsel-less" in the wake of the dismissal of his habeas petition). The Commonwealth's suggested "questions" for review thus mischaracterize Mr. Michael's response to the District Court's order, given his stated wish to have that decision reviewed.

The Commonwealth's questions also ignore the issues raised by Mr. Michael's multiple vacillations concerning just what, how and with whom he wishes to proceed. The Commonwealth ignores Mr. Michael's bewildering flip-flops in its effort to have this Court review a decision which is not ripe for such, and further ignores the reasons for the decision of the Circuit to remand, i.e., to address the questions raised by the District Court's own expert that

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[8]See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"); Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co., 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] is not yet ripe for review by this Court").

his prior opinion may now be in question. The petition for writ of certiorari should therefore be denied.

The questions raised by the Commonwealth in the *Petition* do not even take issue with the interlocutory order of the Third Circuit itself, but rather with *prior* interlocutory rulings by that Court. In fact, both questions raised by the Commonwealth are irrelevant to the latest order of the Third Circuit, which is ostensibly at issue. For example, the first question which the Commonwealth seeks to present for certiorari review has to do with whether the Circuit should have "entertain[ed]" Respondent's appeal, given the finding of competence and waiver by the District Court, and the supposed "objection" of Mr. Michael to the filing of this appeal.[9]

Because of the factual, legal and procedural complexities of the appeal, the Third Circuit has considered multiple submissions by the parties, and has heard oral argument twice on the appeal. It has now decided that its resolution of the appeal would be furthered by a limited remand to the District Court. Nothing in the Commonwealth's submission suggests *any* reason to think that this Court is in a better position than the Third Circuit to untangle these complexities, or that there is *any* need for immediate resolution of these questions by this Court (particularly since this is an issue that has been present in the case since the Third Circuit first decided to consider the appeal).

Likewise, the second question presented by the Commonwealth criticizes the Circuit's grant of a certificate of appealability, which occurred in the summer of 2004. Neither of these

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[9]The Commonwealth conveniently ignores the fact that the District Court order not only left Mr. Michael without counsel at a critical time in the habeas/appellate process, but that within hours of the Third Circuit's invitation, Mr. Michael embraced the appeal as his own and asked for appointment of undersigned as his counsel to advance that appeal.

decisions, which were obviously interlocutory, were challenged at the time by the Commonwealth through the certiorari process (nor should they have been). There is nothing about the remand order in question that has suddenly made those questions more important, or more in need of immediate resolution by this Court now.

The same is true of the reasons advanced by the Commonwealth for granting the writ in the body of the *Petition*. The Commonwealth first asserts that the Third Circuit's decision to remand for an evaluation of competence runs contrary to this Court's decisions in Whitmore v. Arkansas, 495 U.S. 149 (1990), and Demosthenes v. Baal, 495 U.S. 731 (1990).

In fact, however, there is no inconsistency between the interlocutory order of the Third Circuit and the decisions in those cases. Both Whitmore and Baal dealt with the question of Article III jurisdiction to hear "next friend" filings, an issue which has nothing to do with the Third Circuit's ruling. Moreover, in this case the Third Circuit has determined that there is a "substantial question" as to Mr. Michael's current competency and as to whether, if competent, he wishes the appeal to go forward. Michael v. Horn, 459 F.3d at 419-21. Nowhere in its opinion, however, did the unanimous Third Circuit question in any way the underlying principle that a competent defendant who wishes to do so may dismiss his appeal, even if the result of such a decision is the defendant's execution. Rather, consistent with this Court's decision in Rees v. Peyton, 384 U.S. 312, 314 (1966), the Third Circuit seeks only to determine whether Mr. Michael, *at present*, has the "capacity to make an intelligent decision" about his pending appeals. The non-existent "conflict" with Whitmore, Baal or the decisions of other circuits is no basis for this Court to grant certiorari review of the Third Circuit's interlocutory ruling.

Accordingly, it strains credulity to suggest that the order in question below somehow runs

afoul of decisions of this Court on entirely different issues. The Third Circuit's interlocutory decision does nothing to prejudice the Commonwealth, and addresses only that need, affirmed by this Court in Rees, that federal courts be sure of a litigant's competence before ruling on ultimate matters such as whether his right to habeas review should evaporate, or his life end without exercise of such review by the judiciary. For these reasons, as well as those mentioned above, certiorari should be denied.

Similarly, the second reason presented by the Commonwealth for granting certiorari is to correct a purported error by the Third Circuit in granting COA. *Petition*, at 16-18. In no way does the Third Circuit's supposed error in granting COA raise an issue worthy of this Court's certiorari review. Seemingly grasping at straws, the Commonwealth goes so far as to suggest that this Court should grant certiorari to tell the Third Circuit that it erred in its 2005 ruling, which the Third Circuit itself has since vacated. *Petition*, at 17 & n.8. This Court does not take cases merely for the purpose of correcting errors, much less for the purpose of correcting errors in interlocutory rulings, and still less (if possible) to correct errors in an interlocutory order that a lower court has already vacated. The Commonwealth's request that it should do so is unworthy of the requested grant.

CONCLUSION

The Third Circuit's interlocutory order remanding the case for a determination of Mr. Michael's competence is not in conflict with any decision of this Court, of any state supreme court, or of any other circuit court of appeals. The Third Circuit is in the best position to manage its own docket and decide how to determine whether the appeal should go forward or be dismissed. This case is not now (if it ever will be) ripe for this Court's review. The petition for writ of certiorari should be denied.

Respectfully submitted,

JOSEPH M. COSGROVE
1460 Wyoming Avenue
Forty Fort, PA 18704
570-287-0921

Counsel for Hubert L. Michael

Dated: January 22, 2007